FILE COPY.

FILED.
JAN 15 1907
JAMES H. McKENNEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1906

No. 173

The United States Fidelity and Guaranty Company,

Plaintiff in Error

vs.

The United States of America Suing for the benefit of James S. Kenyon

Doing business as Burrows & Kenyon

Brief for Defendant in Error on the Question of the Jurisdiction of the Circuit Court of the first circuit in the above entitled action.

EDWARD D. BASSETT
Attorney for Defendant in Error

PROVIDENCE
E. A. JOHNSON & CO. PRINTERS
1907

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 173

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,

PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA,

SUING FOR THE BENEFIT OF JAMES S. KENYON, DOING BUSINESS AS BURROWS & KENYON.

ANALYSIS OF BRIEF.

	PAGE
Statement	1
A. The Action	1
B. Question at Issue	2
C. United States Statutes Involved in this Question	3
(1) Act of Aug. 13, 1894, Ch. 280	3
(2) Act of Aug. 13, 1894, Ch. 282	4
(3) Act of Feb. 24, 1905, 33 Stat. at L, Chap. 778	4
D. Bond in Controversy	6
Points of Law	8
Point I. The United States is a Real, not a Nominal Party to the Action on the Contractor's Bond	8

PAGE

A. The History of the Statute and kindred Enactments passed the same day show this interest. 9

(1) The Intent of Congress in passing the Act. 9

(2) There was a general Scheme providing for the improvement and advancement of public work. 10

(a) Chapter 282. (28 Stat. 279) . . . 10

(3) It was the intent of Congress to have these actions brought in the United States Courts 11

(a) The Act expressly makes the United States the legal plaintiff. . . 11

(b) Certain provisions of the Act are applicable only to Federal Courts . . 11

(c) The right of the material man is derived by virtue of an act of Congress. 11

(d) The United States may intervene in these suits 12

(e) Recent legislation of Congress . . 12

B. The United States has a real interest in the bond and permits parties to be subrogated to its rights 12

(1) Interest is two-fold 12

(a) A direct pecuniary interest 12

(b) As a contractor of public works 12

(2) The United States has made a contract for benefit of third parties and is necessarily the legal plaintiff in the suit brought on that contract 14

PAGE

(a) The residence of the legal plaintiff determines the jurisdiction of the Circuit Courts 15

(b) The United States being party plaintiff the amount in controversy is immaterial 16

(c) The United States are irrevocable trustees for the injured party, aggrieved by breach of the bond 16

Point II. Jurisdiction of the United States Courts has been sustained in analogous cases wher the United States permits parties where bonds are taken in the name of the United States to bring suit upon them 18

A. Marshal's Bonds 18

B. Bond of Clerk of a Court 19

Point III. The reasoning of the court in cases of similar nature in the first circuit where jurisdiction has been entertained is clearer and more convincing than the reasoning of the adverse decisions in the sixth, seventh and ninth circuits 20

A. The first circuit decisions 20

B. The decisions in the sixth, seventh and ninth circuits 21

C. Reasonings compared 22

Conclusions 24

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 173

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,

PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA,

SUING FOR THE BENEFIT OF JAMES S. KENYON, DOING BUSINESS AS BURROWS & KENYON.

Brief for Defendant in Error

STATEMENT OF THE CASE.

A. The Action.

This is a writ of error to the Circuit Court of the United States for the District of Rhode Island.

The plaintiff in error seeks to review the decision of the Circuit Court of the District of Rhode Island, wherein it denied the defendant's (now plaintiff in error) motion to dismiss the suit of United States of America,

Plaintiff vs. Joseph J. Churchyard and the United States Fidelity and Guaranty Company, Defendants, Law 2713, for want of jurisdiction.

The action below was a suit upon a bond given to the United States of America by a contractor under the provisions of the Act of Congress of August 13, 1894, Chapter 280, Sec. 1, 28 Stat. 278, entitled "An Act for the Protection of Persons Furnishing Material and Labor for the Construction of Public Works" and the amount involved in the controversy is less than two thousand dollars. The suit was one of seventeen actions brought against one Churchyard, a government contractor, for certain work upon various fortifications in Narragansett Bay and against the sureties upon his bonds.

B. Question at Issue.

The question raised and certified to this Court as appears by the Transcript of Record, page 10, is:

Does the Circuit Court of the United States have jurisdiction to entertain an action in the name of the United States for the use and benefit of a person supplying labor and materials for public buildings or work upon a certified copy of a bond given under the provisions of the Act of Congress of August 13, 1894, Chapter 280, Sec. 1, 28 Stat. 278, entitled, "An Act for the Protection of Persons Furnishing Material and Labor for the Construction of Public Works," wherein the amount involved is less than two thousand dollars?

C. The United States statutes involved in this question.

The statute under which this action was brought was the Act of August 13, 1894, Ch. 280 (28 St. 278), entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works," which provides:

> "That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work or for repairs upon any public building or public work, shall be required before commencing such work to execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract; and any person or persons making application therefor, and furnishing affidavit to the Department under the direction of which said work is being, or has been, prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, shall be furnished with a certified copy of said contract and bond, upon which said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties and to prosecute the same to final judgment and execution: *Provided*, That such action and its prosecutions shall involve the United States in no expense.

> "Sec. 2. Provided that in such case the court in which such action is brought is authorized to require proper security for costs in case judgment is for the defendant."

Two other statutes tend to throw light upon the interpretation the above statute should receive; for convenience they are inserted here, these are

(1) THE ACT OF AUGUST 13, 1894, CHAP. 282 (28 STAT. 279), ENTITLED "AN ACT RELATIVE TO RECOGNIZANCES, STIPULATIONS, BONDS AND UNDERTAKINGS AND TO ALLOW CERTAIN CORPORATIONS TO BE ACCEPTED AS SURETY THEREON," PROVIDED—

> "Sec. 5. That any surety company doing business under the provisions of this Act may be sued in respect thereof in any court of the United States which has now or hereafter may have jurisdiction of actions or suits upon such recognizance, stipulation, bond or undertaking in the district in which such recognizance, stipulation, bond or undertaking was made or guaranteed or in the district in which the principal office of such company is located."

(2) THE ACT OF FEBRUARY 24, 1905, 33 STAT. AT L. 811, CHAP. 778, WHICH AMENDS CHAP. 280, *Supra*, AND THE MATERIAL PORTIONS OF WHICH READ AS FOLLOWS:

> "That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and suffi-

cient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; AND ANY PERSON, COMPANY, OR CORPORATION WHO HAS FURNISHED LABOR OR MATERIALS USED IN THE CONSTRUCTION OR REPAIR OF ANY PUBLIC BUILDING OR PUBLIC WORK, AND PAYMENT FOR WHICH HAS NOT BEEN MADE, SHALL HAVE THE RIGHT TO INTERVENE AND BE MADE A PARTY TO ANY ACTION INSTITUTED BY THE UNITED STATES ON THE BOND OF THE CONTRACTOR, AND TO HAVE THEIR RIGHTS AND CLAIMS ADJUDICATED IN SUCH ACTION AND JUDGMENT RENDERED THEREON, SUBJECT, HOWEVER, TO THE PRIORITY OF THE CLAIM AND JUDGMENT OF THE UNITED STATES. IF THE FULL AMOUNT OF THE LIABILITY OF THE SURETY ON SAID BOND IS SUFFICIENT TO PAY THE FULL AMOUNT OF SAID CLAIMS AND DEMANDS, THEN, AFTER PAYING THE FULL AMOUNT DUE TO THE UNITED STATES, THE REMAINDER SHALL BE DISTRIBUTED PRO RATA AMONG SAID INTERVENERS. IF NO SUIT SHOULD BE BROUGHT BY THE UNITED STATES WITHIN SIX MONTHS FROM THE COMPLETION AND FINAL SETTLEMENT OF SAID CONTRACT, THEN THE PERSON OR PERSONS SUPPLYING THE CONTRACTOR WITH LABOR AND MATERIALS * * * * * SHALL HAVE A RIGHT OF ACTION AND SHALL BE AND ARE HEREBY AUTHORIZED TO BRING SUIT IN THE NAME OF THE UNITED STATES IN THE CIRCUIT COURT OF THE UNITED STATES IN THE DISTRICT IN WHICH SAID CONTRACT WAS TO BE PERFORMED AND EXECUTED, IRRESPECTIVE OF THE AMOUNT IN CONTROVERSY IN SUCH SUIT, AND NOT ELSEWHERE, FOR HIS OR THEIR USE AND BENEFIT, AGAINST SAID CONTRACTOR AND HIS SURETIES, AND TO PROSECUTE THE SAME TO FINAL JUDGMENT AND EXECUTION: PROVIDED, THAT WHERE SUIT IS INSTITUTED BY ANY OF SUCH CREDITORS ON THE BOND OF THE CONTRACTOR IT SHALL NOT BE COMMENCED UNTIL AFTER THE COMPLETE PERFORMANCE OF SAID CON-

TRACT AND FINAL SETTLEMENT THEREOF; AND SHALL BE COMMENCED WITHIN ONE YEAR AFTER THE PERFORMANCE AND FINAL SETTLEMENT OF SAID CONTRACT AND NOT LATER."

(Small capitals ours, showing how the amended chapter differs from the original.)

D. Bond in Controversy.

KNOW ALL MEN BY THESE PRESENTS, That we, Joseph J. Churchyard of Buffalo in the County of Erie State of New York, as principal, and The United States Fidelity and Guaranty Company, a corporation existing under the laws of the State of Maryland, as surety, are held and bound unto the UNITED STATES OF AMERICA in the penal sum of Five Hundred Dollars ($500.00), to the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH, That whereas the above bounden Joseph J. Churchyard has, on the Twenty-ninth day of June, 1899, entered into a contract with the United States, represented by 1st Lieut. E. W. Hubbard, 7th Artillery Quartermaster for The Construction at Fort Greble, R. I., One Non-Com. Office_'s Quarters.

NOW, THEREFORE, If the above-bounden Joseph J. Churchyard, his heirs, executors, or administrators, shall and will, in all respects, duly and fully observe and per-

form all and singular the covenants, conditions, and agreements in and by the said contract agreed and covenanted by said Joseph J. Churchyard to be observed and performed according to the true intent and meaning of the said contract, and as well during any period of extension of said contract that may be granted on the part of the United States as during the original term of the same, and shall promptly make full payments to all persons supplying him labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise, to remain in full force and virtue.

IN WITNESS WHEREOF, The parties hereto have executed this instrument this ninth day of August, 1899; the name and corporate seal of said surety being hereto affixed and these presents duly signed by its attorney-in-fact, pursuant to a resolution of its Board of Directors, passed on the ninth day of January, 1899, a copy of the record of which is on file in the War Department.

In presence of

Kate Knempel as to Joseph J. Churchyard (Seal)

Attest:

James Ryan The United States Fidelity and
Attorney-in-fact Guaranty Company,

By Vincent D. Ryan, (Seal)
Attorney-in-fact.

POINTS OF LAW.

The United States Circuit Court has jurisdiction to entertain the actions provided by the Act of Congress of August 13,1894, Chap. 280, Sec. 1 (28 Stat. 278) and Chap. 282, Sec. 1 (28 Stat. 278) and Chap. 282 (28 Stat. 279), for

I. THE UNITED STATES IS A REAL, NOT A NOMINAL, PARTY TO THE ACTION ON THE CONTRACTOR'S BOND.

II. JURISDICTION OF THE UNITED STATES COURTS HAS BEEN SUSTAINED IN ANALAGOUS CASES WHERE THE UNITED STATES PERMITS PARTIES WHERE BONDS ARE TAKEN IN THE NAME OF THE UNITED STATES TO BRING SUIT UPON THEM.

III. THE REASONING OF THE COURT IN CASES OF SIMILAR NATURE IN THE FIRST CIRCUIT WHERE JURISDICTION HAS BEEN ENTERTAINED IS CLEARER AND MORE CONVINCING THAN THE REASONING OF THE ADVERSE DECISIONS IN THE SIXTH, SEVENTH AND NINTH CIRCUITS.

I.

The United States is a real, not a nominal, party to the action on the contractor's bond.

A. THE HISTORY OF THE STATUTE AND KINDRED ENACTMENTS PASSED THE SAME DAY SHOW THAT THE UNITED STATES HAS A REAL INTEREST IN THE BOND.

(1) IT WAS THE INTENTION OF CONGRESS WHEN THIS ACT WAS PASSED TO AID THE UNITED STATES IN PROSECUTING PUBLIC WORKS, FOR BY THE TERMS OF THE ACT A MATERIAL MAN WAS IN NO DANGER OF LOSING HIS MONEY; HENCE, WOULD FURNISH MATERIALS AND LABOR PROMPTLY.

a. The act was passed on August 13, 1894, and it provides that "the contractor shall execute the *usual* penal bond * * * * * with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials," etc., and provides further that upon breach being duly proven such person shall be authorized to bring suit in the name of the United States for his or their use against said contractor and sureties, and to prosecute the same to final judgment and execution.

The learned judge of the court below very properly said: Par. 23, p. 13, Transcript of Testimony) "It was the apparent intent of Congress to work out the protection of material men and laborers through a contract between the United States and the contractor. In determining the intent of Congress we should look rather to the particular pecuniary interest of the United States in the special case before us. It is apparent that the actions provided for by act embrace both those that may

pecuniarily affect the United States and those that may not * * * * * * * When Congress to work out a specific purpose requires a contract with the United States and authorizes a suit on that contract, we are not at liberty to say that this mode of effecting the object is all unreal, nominal and unsubstantial. Even if the form established for working out the purpose was somewhat fictional in character, we should hesitate to destroy the statutory machinery if we would thereby practically frustrate the purpose of the act or impair its value."

Even the learned judge in United States *vs.* Sheridan, 119 Fed. 236, page 239, in writing an adverse opinion on this question says: "It is true that the act of August 13, 1894, was enacted for beneficial purposes, and possibly those benefits to a certain extent may extend to the United States in making more certain and prompt the obtaining of materials and labor by contractors on public works who have given the bond with surety upon which outside parties can rely."

(2) THERE WAS A GENERAL SCHEME PROVIDING FOR THE IMPROVEMENT AND ADVANCEMENT OF PUBLIC WORK AS IS SHOWN BY SIMILAR LEGISLATION PASSED THE SAME DAY.

a. Chapter 282, (28 Stat. 279) enacted August 13, 1894, provides when and under what conditions surety companies shall be allowed to become surety upon bonds required by virtue of Chapter 280 (28 Stat. 278). It also provides where and in what courts said bonds shall be sued, i. e., in the Courts of the United States.

See Sec. 5, Chapter 282, supra.

These two chapters undoubtedly, when taken together show that they were part of a general scheme for the providing of bonds, surety, etc., and the enforcement of rights in relation thereto, and that the United States has a real interest in the successful enforcement of this legislation.

(3) IT MUST ALSO HAVE BEEN THE INTENT OF CONGRESS THAT THE ACTION PROVIDED FOR IN THE ACT SHOULD BE BROUGHT IN THE COURTS OF THE UNITED STATES.

a. The act (Chap. 280, Aug. 13, 1894) expressly makes the United States the legal plaintiff.

In suits at law the *legal* interest alone is regarded in testing the jurisdiction of the United States Courts.

Colson vs. *Lewis*, 2 Wheat. 377.
Irvine vs. *Lowry*, 14 Peters, 293.
Dodge vs. *Tulley*, 144 U. S. 451.

b. The provisions allowing suits to be brought on certified copies of contract bonds and for security for costs, etc., should be applicable only to courts subject to congressional legislation.

c. The rights of the material man arising by virtue of an act of Congress can only be enforced in the Courts of the United States.

Martin vs. *Hunter*, 1 Wheat. 330.
Ellis vs. *Norton*, 16 Fed. 4.
United States vs. *Lathrop*, 17 Johns. 3.
New Orleans etc., vs. *Miss.*, 102 U. S., 135.
Bock vs. *Perkins*, 139 U. S. 621.

d. The United States might at any time wish to intervene in suits of this kind, (as in fact it did intervene in the case of *American Surety Co.* vs. *Lawrenceville Cement Co.*, 96 Fed. 25) which it could do only in the Courts of the United States. In that case the United States would sue in one court and the material man would be obliged to sue in a state court; thus proper adjustment of the equities could not be accomplished.

e. The fact that Congress by Act of Feb. 24, 1905, 33 Stat. at L. 811 Chap. 778 has amended Chap. 280 so as to read that the suit should be brought in the Circuit Court of United States must be given great weight in determining its intention. *United States for use of Hill* vs. *American Surety Co.*, 200 U. S. 197.

B. THE UNITED STATES HAS A REAL, NOT MERELY A NOMINAL, INTEREST IN THE BOND, AND THE UNITED STATES HAVING OBTAINED THE BENEFIT OF MATERIAL FURNISHED AND PROMPT SERVICE, PERMITS PARTIES TO BE SUBROGATED TO ITS RIGHTS.

(1.) THIS INTEREST IS TWO-FOLD:

(a.) A direct pecuniary interest.

(b.) An interest as a constructor of public works to protect those persons who incorporate their labor or material into the works.

In *American Surety Co.* vs. *Lawrenceville Cement Co.*, supra, (96 Fed. 25, 26) Judge Putnam says:

> "The United States, by force of the statute which we have cited, voluntarily makes themselves trustee alike for their own interest and the interest of the individuals intended to be protected; and having thus voluntarily created and accepted a trust, they are barred by equitable principles from asserting for themselves any advantage over other benficiaries."

In *United States* vs. *National Surety Co.*, 34 C. C. A. (a case brought on the bond furnished by virtue of statute under discussion and where the Circuit Court of Appeals, 8th Circuit, took jurisdiction, where the amount involved was only $842.98) Judge Thayer says, p. 529:

> "The bond which is provided for by the act was intended to perform a double function,—in the first place to secure the Government, as before, the faithful performance of all obligations which a contractor might assume towards it, and in the second place, to protect third persons from whom the contractor obtained materials and labor."

This Court, Mr. Justice Day writing the opinion, in *United States* vs. *American Surety Co.*, 200 U. S., 197, in construing the terms of this statute says, at p. 199:

> "The purpose of the law is, as its title declares: 'For the protection of persons furnishing materials and labor for the construction of public works.' If literally construed, the obligation of the bond might be limited to secure only persons supplying labor or materials directly to the contractor, for which he would be personally liable. But we must not overlook, in construing this obligation, the manifest purpose of the statute to require that *material and labor actually contributed to the construction*

of the public building shall be paid for, and to provide a security to that end."

"Statutes are not to be so literally construed as to defeat the purpose of the legislature. 'A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter.' *United States* vs. *Freeman*, 3 How. 556, 11 l. Ed. 724, 'The spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent, Chief Justice Marshall, in *Durousseau* vs. *United States*, 6 Cranch, 308, 3 L. Ed. 232.

"Looking to the terms of this statute in its original form, and as amended in 1905, we find the same congressional purpose to require payment for material and labor which have been furnished for the construction of public works. The affidavit to be filed with the head of the department under the direction of which the work has been prosecuted requires the affiant to state that labor or materials for the prosecution of such work has been supplied by him, for which payment has not been made, and such persons are given the right of action on the bond in the name of the United States. Language could hardly be plainer to evidence the intention of Congress to protect those whose labor or material has contributed to the prosecution of the work."

(2) THE UNITED STATES HAS CLEARLY MADE A CONTRACT FOR THE BENEFIT OF THIRD PARTIES AND HAS EXPRESSLY AUTHORIZED SUCH PARTIES AS ARE AGGRIEVED

BY A BREACH OF CONTRACT TO SUE IN THE NAME OF THE UNITED STATES; HENCE THE UNITED STATES MUST BE THE LEGAL PLAINTIFF.

a. The residence of the trustee or legal plaintiff determines the jurisdiction of the Circuit Courts.

Bonafee vs. *Williams*, 3 Howard, 574
Knapp vs. *Troy & Boston R. R. Co.*, 20 Wall. 117
Dodge vs. *Tulleys*, 144 U. S. 451
Coal Co. vs. *Blatchford*, 11 Wall., 172

aa. The plaintiff in error will argue that this action is not a controversy in which the United States is plaintiff or petitioner, but is only a modal party as is shown in the following cases decided by this court.

McNutt vs. *Bland*, 2 Howard, 10
Browne vs. *Strode*, 5 Cranch, 303
Huff vs. *Hutchinson*, 14 Howard, 587
Maryland vs. *Baldwin*, 112 U. S. 490

In each of these cases, which are actions on bonds given to an officer by virtue of some statute for the sole benefit of the persons whom it may concern, the interest of the plaintiff was purely nominal. "They were not trustees and held nothing for the use or benefit of the real parties. They could not, as in said *McNutt* vs. *Bland*, prevent the institution or prosecution of the actions or exercise any control over them." (*Coal Co.* vs. *Blatchford*, *supra*).

bb. In the case at bar, however, the United States has a potential interest, to say the least.

It may wish to intervene in the action, as it did in the case of the *American Surety Co.* vs. *Lawrenceville Cement Co., supra.*

It might wish to participate as a creditor in the distribution of assets, it might wish to institute a suit on its own behalf for a breach of the conditions, as the bond is to protect itself as well as the material men, it has an interest "as an insurer of persons in whose protection it has an interest analagous, perhaps, to that which it has in a suit to cancel a patent for lands or for an invention, not because of any benefit to itself, but because of an obligation to the public or individuals." (Judge Brown's opinion.) 132 Fed. p. 88.

It is aggrieved by the failure of Churchyard to pay for the work and materials furnished in the construction of the non-commissioned officers quarters at Fort Greble, R. I. (see conditions in bond).

b. Where the United States is plaintiff in an action, the Circuit Court has jurisdiction without regard to the value of the matter in dispute.

United States vs. *Sayward*, 160 U. S. 493
United States vs. *Reid*, 90 Fed. 522

c. Even if the statute had not expressly given the right to sue on the contractor's bond, a material man injured by a breach could have sued in the name of the United States as irrevocable trustees for the injured party.

Stephenson, et al. vs. *Monmouth, Minn. and Mfg. Co.*, 28 C. C. A. 292, 54 U. S. App. 499

In this case, Lurton, J., speaking on the question of trusteeship where a bond is taken by a city securing the payment of materials furnished and labor performed in construction of a public improvement, says on page 295 (28 C. C. A.): "So far as the bond is for the protection of the city it may *deal with it as it chooses; but so far as it is for the benefit of third persons it is a mere trustee* and could do nothing which would legally discharge the bond or affect the interest of the beneficiaries."

For other cases supporting this principle that the obligee of bond given pursuant to a statute for the protection of labor and material men is a mere trustee, see:

Horn vs. *Whittier*, 6 N. H. 88, *94*
Devers vs. *Howard*, 144 Mo. 671
Sample vs. *Hale*, 34 Neb. 220, 225, 226
Baker vs. *Bryan*, 64 Ia. 562

In this case (*Baker* vs. *Bryan*, *supra*) which was an action brought on a contractor's bond furnished a School District by virtue of statute and which provided that contractor shall "pay all claims for material and labor it used in the construction of said building," the Court has this to say regarding the interest of the School District in the faithful performance of the conditions of the bond, in allowing a material man to sue on the bond in his own name (p. 565, 566):

> "That the sub-contractors, knowing that they were secured, would do better work and furnish better material than if they felt certain about their pay, cannot be doubted. And it is equally certain that the credit which the contractor would gain by the security would enable him to prosecute the

work more rapidly and with greater hope of profit. These things, it may readily be seen, would result in great benefit to the District."

It seems to us that the same reasoning is applicable with equal force to the interest of the United States in the case at bar.

II.

Jurisdiction of the United States Courts has been sustained in analogous cases where the United States permits parties where bonds are taken in the name of the United States to bring suit upon them.

A. MARSHAL'S BONDS.

Sec. 784 Revised Statutes provide:

"In case of a breach of the conditions of a marshal's bond, any person thereby injured may institute in his own name and for his sole use, a suit on said bond and thereupon shall recover such damages as shall be legally assessed with costs of suit, for which execution may issue for him in due form. If such party fails to recover in the suit, judgment shall be rendered and execution may issue against him for costs in favor of the defendant, the United States in no case shall be liable for the same."

(1) IT IS WELL SETTLED THAT SUITS BROUGHT IN PURSUANCE OF THIS SECTION AND ITS AMENDMENTS CAN BE MAINTAINED IN THE COURTS OF THE UNITED STATES. IN FACT, THE FEDERAL COURTS MUST NECESSARILY HAVE JURISDICTION

IN SUCH SUITS BECAUSE THE CASE DEPENDS UPON THE SCOPE AND EFFECT OF THAT BOND AND MEANING OF THE STATUTES OF THE UNITED STATES.

Adler vs. *Newcombe*, 2 Dill, 45
United States vs. *Davidson*, 1 Biss. 433
Bock vs. *Perkins*, 139 U. S. 628
Howard vs. *United States, etc.*, 184 U. S. 676, *681*, affirming *Bock* vs. *Perkins*

In *Bock* vs. *Perkins. supra*, this Court says:

> "A case, therefore, depending upon the inquiry whether the marshal or his deputy has rightfully executed a lawful precept directed to the former from a Court of the United States, is one arising under the laws of the United States, for as this Court has said, 'cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party in whole or in part by whom they are asserted.'"

B. BOND OF CLERK OF A COURT.

(1) A SUIT ON BOND GIVEN IN ACCORDANCE WITH THE JUDICIARY ACT OF 1879 AND ITS AMENDMENT BY ACT OF FEBRUARY 22d, 1875, (18 STAT. 333, CHAP. 95) BY A CLERK OF A COURT CONDITIONED THAT HE IS "FAITHFULLY TO DISCHARGE THE DUTIES OF HIS OFFICE AND SEASONABLY TO RECORD THE DECREES, JUDGMENTS, AND DETERMINATIONS OF THE COURT OF WHICH HE IS CLERK" IS HELD TO BE WITHIN THE JURISDICTION OF THE CIRCUIT COURT WITHOUT A DIVERSITY OF CITIZENSHIP.

Howard vs. *United States*, 184 U. S. 676.

The reasoning of the court on page 681 in showing cause why the federal courts had jurisdiction independently of a citizenship question, applies with equal force to jurisdiction of suit in the case at bar. "The suit was directly upon a bond taken by the Circuit Court in conformity with the statutes of the United States and the case depends upon the *scope and effect of that bond and the meaning of those statutes.* It was therefore a suit arising under the laws of the United States.

III.

The reasoning of the Court in cases of similar nature in the first circuit where jurisdiction has been entertained is clearer and more convincing than the reasoning of the adverse decisions in the sixth, seventh and ninth circuits.

A. THE FIRST CIRCUIT DECISIONS.

An action on the bond of a contractor furnished under the provisions of the Act of Congress, August 13, 1894, Chap. 280, has been entertained in the following cases:

American Surety Co. vs. *Lawrenceville Cement Co.*, 96 Fed. 25; 110 Fed. 718 and 913
United States vs. *O'Brien*, 120 Fed. 447
United States vs. *Churchyard, et al.*, 132 Fed. 82

In these cases the reasoning of the court in sustaining jurisdiction is:

(1) THAT THE UNITED STATES HAS A REAL INTEREST IN THE BONDS IN QUESTION AND SUITS THEREON.

(2) THE UNITED STATES, BY VIRTUE OF THE STATUTE HAS MADE A CONTRACT FOR THE BENEFIT OF THE MATERIAL MEN; A CONTRACT FROM WHICH IT HAS DERIVED GREAT MATERIAL BENEFIT, THEREFORE, IT IS A TRUSTEE BOTH FOR ITS OWN INTEREST AND THE INTEREST OF THE INDIVIDUALS INTENDED TO BE PROTECTED.

(3) THAT THE PURPOSE OF CONGRESS SHOULD NOT BE FRUSTRATED AND THE ACT RENDERED VALUELESS BY A CONSTRUCTION THAT PRACTICALLY REMOVES ALL THE BENEFITS INTENDED BY THE ACT.

(4) THAT THE UNITED STATES IS THE LEGAL PLAINTIFF BY THE VERY TERMS OF THE STATUTE, AND THEREFORE, THAT AN ACTION BROUGHT UNDER THE PROVISIONS OF THE ACT IS SUIT WHEREIN THE UNITED STATES IS A PARTY PLAINTIFF OR PETITIONER; HENCE, IS PROPERLY WITHIN THE JURISDICTION OF THE UNITED STATES COURTS.

B. THE DECISIONS IN THE SIXTH, SEVENTH AND NINTH CIRCUITS.

Jurisdiction of the United States Courts in suits of similar nature has been denied in the following cases:

United States vs. *Henderlong*, 102 Fed. 2, 6th Circuit.

United States vs. *Sheridan*, 109 Fed. 236, 7th Circuit.

United States vs. *Barrett*, 135 Fed. 189, 9th Circuit.

The decision of all three cases is based upon the following grounds:

(1) THE UNITED STATES HAS NO INTEREST DIRECTLY OR INDIRECTLY IN THE CONTROVERSY.

(2) THE UNITED STATES IS SIMPLY A FORMAL OR MODAL PARTY; HENCE, IS NOT A PARTY PLAINTIFF WITHIN THE MEANING OF THE JUDICIARY ACT OF MARCH 3, 1887.

C. THE REASONINGS COMPARED.

It seems that the opinion of the learned judges of the Sixth, Seventh and Ninth Circuits wholly ignore the real interest of the United States in these actions. The opinion of Judge Baker in *United States* vs. *Henderlong*, *supra* (p. 4) says:

> "The United States has no interest either *directly* or *indirectly* in the controversy, nor can they be liable for costs."

This does not take into consideration the vital interests of the United States in these actions on the bonds, for:

(1) THE UNITED STATES AS A CREDITOR MAY BE INTERESTED IN THE DISTRIBUTION PRO RATA AMONG THE CREDITORS WHICH COULD BE ORDERED IN THESE SUITS.

United States vs. *American Surety Co. of New York.*, 135 Fed, 78

American Surety Co. vs. *United States*, 59 C. C. A. 256

United States vs. *Heaton*, 63 C. C. A. 156

(2) THE UNITED STATES MAY INTERVENE IN THESE ACTIONS.

American Surety Co. vs. *Lawrenceville Cement Co.*
96 Fed. 25.

(3) THE UNITED STATES AS CONSTRUCTOR OF PUBLIC WORKS IS NECESSARILY BENEFITED BY THE BOND IN QUESTION AND THE RIGHTS IT HAS GIVEN TO CREDITORS OF THE CONTRACTOR.

(See Point I, B (2) c.)

(4) THE UNITED STATES IS THE OBLIGEE NAMED IN THE BOND, AND THAT UNDER THE WELL-SETTLED DOCTRINE AT COMMON LAW AN ACTION ON A BOND UNDER SEAL MUST BE BROUGHT IN THE NAME OF THE OBLIGEE IRRESPECTIVE OF THE OWNER.

(5) THAT THE UNITED STATES HAS BY THE TERMS AND SCOPE OF THE ACT MADE ITSELF A TRUSTEE FOR THE BENEFIT OF THE PERSONS INTENDED TO BE PROTECTED, AND AS SUCH TRUSTEE ARE A NECESSARY PARTY TO THE ACTION.

(See Point I, B (1) and (2).)

(6) THE UNITED STATES IS EXPRESSLY MADE THE LEGAL PLAINTIFF BY THE TERMS OF THE ACT.

Judge Brown, in *United States* vs. *Churchyard & United Fidelity and Guaranty Co.* (p. 16 transcript) very tersely reasons:

> "When Congress, however, with power to confer jurisdiction, expressly declares that the United States shall take a contract upon which persons may sue in the name of the United States, is there any practical danger in saying that Congress meant exactly what it said, and meant it with no further qualification than that expressly stated? I have

before me, as the legal plaintiff, the United States, —a legal cause of action—a contract between the United States and the contractor."

Conclusion.

With reason and authority to support the proposition that the United States has a real and vital interest in the actions provided for by the Act of Congress of August 13, 1894, Chap. 280, Sec. 1, it would seem that there can be no question as to the jurisdiction of the Circuit Court of the First Circuit in the case at bar.

IV.

The jurisdictional question raised in this case should be answered in the affirmative.

Respectfully submitted,

EDWARD D. BASSETT,

Atty. for Defendant in Error.